

FILED

MAR -9 2016

David H. Yarnall, Clerk of the Superior Court
County of Santa Clara, California

D. Mendel

1 NIELSEN MERKSAMER PARRINELLO

GROSS & LEONI, LLP

2 MARGUERITE MARY LEONI (SBN 101696)

3 CHRISTOPHER E. SKINNELL (SBN 227093)

JAMES W. CARSON (SBN 287001)

2350 Kerner Blvd., Suite 250

San Rafael, CA 94901

4 TELEPHONE: (415) 389-6800 /FAX: (415) 388-6874

Email: mleoni@nmgovlaw.com

5 Email: cskinnell@nmgovlaw.com

6 Email: jcarson@nmgovlaw.com

7 Attorneys for [Proposed] Intervenor Peter Constant

8 KENNETH H. LOUNSBERY (SBN 38055)

JAMES P. LOUGH (SBN 91198)

9 ALENA SHAMOS (SBN 216548)

YANA L. RIDGE (SBN 306532)

10 Lounsbery Ferguson Altona & Peak, LLP

960 Canterbury Place, Suite 300

11 Escondido, California 92025

TELEPHONE: (760) 743-1201 / FAX: (760) 743-9926

12 Email: KHL@LFAP.COM

Email: JPL@LFAP.COM

13 Email: ASO@LFAP.COM

14 Email: YLR@LFAP.COM

15 Attorneys for [Proposed] Intervenors, Steven Haug and Silicon Valley Taxpayers Association, a
16 California non-profit corporation.

17
18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF SANTA CLARA**

20 THE PEOPLE OF THE STATE OF
21 CALIFORNIA on the RELATION of SAN
22 JOSE POLICE OFFICERS' ASSOCIATION,

23 *Plaintiff,*

24 v.

25 CITY OF SAN JOSE, and CITY COUNCIL OF
26 SAN JOSE,

27 *Defendants.*

CASE NO. 113-CV-245503

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
APPLICATION TO INTERVENE (C.C.P. §
387)

DATE: April 12, 2016

TIME: 9:00 A.M.

DEPT: 7

JUDGE: McGowen

BY FAX

1 **I. Introduction.**

2 In June 2012, the voters of San Jose, by an overwhelming majority, approved charter
3 amendment Measure B, to reform aspects of the City of San Jose ("City")'s public pension system.
4 Proposed Intervenor Silicon Valley Taxpayers Association (hereinafter "SVTA"), a non-
5 profit organization whose political committee was primarily formed to support Measure "B" at the
6 June 5, 2012 election. SVTA's membership includes San Jose residents and voters who supported
7 and voted for Measure B, and who have a direct interest in its validity and effectiveness. Measure B
8 empowered San Jose voters to approve "any change in matters related to pension and other post-
9 employment benefits," and requires voter approval for any increases to pension or particular retiree
10 health care benefits. (§ 1504-A.) If Measure B is invalidated, not only would the will of San Jose
11 voters be thwarted, but the power granted them over the pension system will be eliminated.

12 Proposed Intervenor Steven Haug is a long-time resident, homeowner, taxpayer and registered
13 voter of the City who has an interest in the preservation of Measure B as approved by the voters. Mr.
14 Haug is treasurer of proposed Intervenor SVTA and campaigned for, supported and voted for Measure
15 B. Proposed Intervenor Haug is among the San Jose voters to whom Section 1504-A of the measure
16 reserved authority to "consider any change in matters related to pension and other post-employment
17 benefits," and approve any increases to pension or certain retiree healthcare benefits.¹

18 Proposed Intervenor Peter Constant is a retired police officer of the City and is a member of
19 a retirement system that is governed, in part, by Measure B. Mr. Constant has a direct interest in the
20 long-term financial stability of the pension program, which is promoted by implementation of
21 Measure B. Proposed Intervenor Constant is also a former San Jose City Council Member who was
22 a principal drafter of Measure B, the crowning achievement of the fiscal reform agenda he
23 spearheaded during his tenure on the City Council. Intervenor Constant is currently a senior fellow
24 at the Reason Foundation, where he works on the Pension Reform Project. Intervenor Constant's
25 professional credentials are based in part on his role as a drafter of Measure B and its continuing
26 integrity. He would be personally harmed in his professional credentials if Measure B is nullified.

27 ¹ This provision of Measure B was upheld as valid by Judge Lucas of this Court in *San Jose*
28 *Police Officers' Association v. City of San Jose* (and Consolidated Actions and Related Cross-
Complaint), Santa Clara Superior Court No. 1-12-CV 225296 ("Consolidated Cases", herein.).

1 Proposed Intervenor are informed and believe the parties herein plan to hijack the *quo*
2 *warranto* jurisdiction of this court to nullify Measure B by stipulated judgment, without even a single
3 hearing on the issues tendered to this Court by the Attorney General when she authorized this action.
4 The parties apparently further propose to have this Court judicially approve a settlement with
5 substitute pension provisions to foist on San Jose voters and taxpayers, provisions that have never
6 been subjected to any public scrutiny or debate in a normal legislative process, but rather were
7 negotiated behind closed doors. In a tip of the hat to the betrayed voters, the parties plan to place on
8 the ballot a Charter amendment to be drafted by them, without public input, containing provisions
9 bearing no resemblance to Measure B or to the substitute pension provisions they have negotiated.²
10 The measure is window-dressing: the judicial nullification of Measure B, and judicial approval of the
11 settlement terms will remain in place, whether or not the ballot measure passes.

12 The specific interests of proposed Intervenor, as set forth above and in the declarations filed
13 herewith, will be directly affected by this court's action. Defendant, in a breach of duty to its voters
14 has apparently determined not to defend Measure B, but rather negotiate with the Relator for its
15 judicial invalidation. Therefore, the interests of proposed Intervenor, and all San Jose voters and
16 taxpayers can be represented, advocated, and protected only by granting this application.

17 **II. Factual Background.**

18 **A. Procedural Status of This Action.**

19 Beginning in 2008, the City of San Jose faced a budget crisis driven in large part by rising
20 costs for employee retirement benefits. In response, the City adopted a fiscal reform program that
21 called for a variety of cost reduction measures, including a possible charter amendment concerning
22 employee retirement benefits. (Statement of Decision in *San Jose Police Officers' Association v. City*
23 *of San Jose* (and Consolidated Actions and Related Cross-Complaint), Santa Clara Superior Court
24 No. 1-12-CV 225296, pp. 2-3 ("Consolidated Cases").)

25 ²In his State of the City Address on March 5, 2016, Mayor Liccardo suggested the entire PF
26 Settlement would be placed on the ballot for voter approval; that is not reflected in the official
27 documentation about the settlement published by the City. (See, *infra*, pp. 4-5 and Decl. of Constant
28 ¶ 14; compare, <http://sanjose.granicus.com/ViewPublisher.php?view_id=51> at 22:03. The
settlement would be placed on the ballot only if the parties herein are not successful in using the *quo*
warranto process to wipe Measure B out of the city Charter by judicial fiat.

1 In March 2012, as part of the fiscal reform plan, and after engaging in a full and complete
2 meet and confer process pursuant to the Meyers-Miliias-Brown Act, the City Council voted to place
3 Measure B on the ballot, and on June 5, 2012, nearly 70% of the City's voters enacted Measure B.

4 On or about June 21, 2012, Relator filed with the California Attorney General an Application
5 for Leave to Sue in *Quo warranto* on the following question: "Did the City of San Jose fulfill its
6 statutory collective bargaining obligations before placing an initiative measure on the June 2012
7 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement
8 contributions and reduce their retirement benefits?"

9 In April 2013, the Attorney General granted leave to Relator to file this action in *quo*
10 *warranto*, concluding, "Leave to sue is GRANTED to determine whether the City of San Jose fulfilled
11 its statutory collective bargaining obligations before placing an initiative measure on the June 2012
12 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement
13 contributions and reduce their retirement benefits." Thereafter, the complaint in this action was filed
14 on April 29, 2013; the City answered the complaint on June 28, 2013 denying all material allegations
15 and asserting its affirmative defenses.

16 In the meantime, six sets of plaintiffs filed actions challenging sections of Measure B. The
17 City defended vigorously including filing a cross complaint for declaratory relief as to the validity of
18 Measure B. All cases were consolidated for trial. The trial court conducted a five-day court trial on
19 11 claims of invalidity. On February 20, 2014, the trial court issued a Statement of Decision. On
20 April 29, 2014, the trial court issued a Judgment. The trial court found in favor of the plaintiffs on
21 three sections of Measure B. The City prevailed on all the other claims. Following entry of Judgment,
22 the parties filed notices and cross notices of appeal, which are still pending.

23 In November 2014, the regularly scheduled general municipal election occurred in San Jose.
24 Arguably, the dominant election issue in San Jose's mayoral race was pension reform. San Jose's
25 mayoral candidates were sharply divided on the issue. Candidate Dave Cortese, backed by the City's
26 unions, campaigned against defending Measure B. Conversely, then-city council member, Sam
27 Liccardo, who voted to place Measure B on the June 2012 ballot and was a staunch supporter,
28 campaigned for mayor in part on a platform supporting vigorous defense of Measure B, thereby

1 earning him the support of much of the local business community. (Decl. of Constant, ¶ 14.)
2 Candidate Liccardo was elected Mayor.

3 At its August 11, 2015 City Council meeting, the Council led by Mayor Liccardo, and despite
4 his campaign promises, announced that it had entered settlement discussions in April 2015 with the
5 Relator herein, SJPOA, and International Association of Fire Fighters ("IAFF"), Local 230, a union
6 that is not relator in this action. The City Council further disclosed that, on or about July 15, 2015,
7 the City, relator SJPOA, and IAFF, Local 230 reached an agreement called Alternative Pension
8 Reform Settlement Framework ("PF Settlement Framework"):

9 The settlement framework is subject to a final overall global settlement with all parties related
10 to Measure B litigation. It is also contingent on the City and the SJPOA reaching agreement
11 on a successor Memorandum of Agreement (MOA). Those discussions are currently ongoing.
12 The City Council has not yet made a decision regarding the path by which to implement the
framework, such as through a 2016 ballot measure to modify Measure B or through the quo
warranto process to remove the language attributable to Measure B from the City Charter.
The City Council will consider that issue at a subsequent meeting.

13 (City of San Jose Memorandum to the Honorable Mayor and City Council from Jennifer Schembri
14 and Jennifer A. Maguire, dated July 24, 2015, p. 2, Ex. 2 to RJN, emphasis added.) The proposed PF
15 Settlement Framework differs substantially from Measure B, including an increase in the retirement
16 benefits multiplier by nearly one-third. (Alternative Pension Reform Settlement Framework
17 Agreement – Executive Summary, dated Sept. 4, 2015, Ex. 10 to RJN.)

18 In a Supplemental Memorandum of August 17, 2015, the City disclosed it had settled upon a
19 path by which the PF Settlement Framework would be implemented:

20 Under the agreement, before the quo warranto process is initiated in Court, the POA and
21 IAFF, Local 230 will work collaboratively with the City to develop a Charter amendment
22 ballot measure, which, if the quo warranto process (as defined in the Settlement Framework
23 and Proposed Quo warranto Implementation Plan) succeeds, will supersede Measure B with
the following: (1) a provision requiring voter approval of defined benefit pension
enhancements, (2) a provision requiring actuarial soundness, (3) a provision prohibiting
retroactivity of defined benefit pension enhancements, and (4) any other provisions contained
in the Settlement Framework to which the parties mutually agree.

24 The ballot measure will go to voters in November 2016. Once the parties mutually agree on
25 language, POA and IAFF agree to endorse the ballot measure. Please refer to Attachment A -
Addendum #1 for the agreement. Once the Federated bargaining units and retirees' association
26 agree to and ratify a global settlement of the remaining Measure B litigation, the
implementation process will begin.

27 (City of San Jose Supplemental Memorandum to the Honorable Mayor and City Council from
28 Jennifer Schembri, dated August 17, 2015, pp. 1-2, Ex. 3 to RJN, emphasis added.) The entire

1 strategy was dependent on a settlement with the Federated unions and retirees' association. Failing
2 that, the entire PF Settlement Framework would be placed on the 2016 ballot:

3 In the event that the Federated bargaining units and retirees' association do not reach
4 agreements to settle litigation with the City or the *quo warranto* process fails to invalidate
5 Measure B, the parties agreed that the November 2016 ballot measure would implement the
Alternative Pension Reform Framework.

6 (*Id.* at p. 2, Ex. 3 to RJN.)

7 Addendum No. 2 to the PF Settlement Framework contemplates IAFF, Local 230 will
8 intervene in this proceeding without objection by the City. (Addendum #2 to July 15, 2015
9 Alternative Pension Reform Settlement Framework Between the City of San Jose and the San Jose
10 Police Officers' Association (POA), The International Association of Firefighters, Local 230 (IAFF);
11 Proposed Quo Warranto Implementation Plan, August 14, 2015 (Attachment B to the August 17,
12 2015 Supplemental Memorandum), p. 1, Ex. 4 to RJN.) To the knowledge of proposed Intervenor,
13 Local 230 has not yet filed its application for intervention. The City Council approved the PF
14 Settlement Framework on August 25, 2015. (Minutes of the City Council, City of San Jose, dated
15 Tuesday, August 25, 2015, p. 9, Ex. 5 to RJN.)

16 At its December 15 City Council meeting, the City announced it had reached agreement about
17 settlement terms with the Federated bargaining units, referred to as the Federated Pension Reform
18 Settlement Framework Agreement ("Federated Settlement Framework"). (City of San Jose, City
19 Council Agenda, December 15, 2015 Synopsis, p. 13, Ex. 8 to RJN.) A memorandum dated
20 December 4, 2015 to the Mayor and City Council summarized relevant portions of the Federated
21 Settlement Framework specifically as it relates to the status of the *quo warranto* action and a future
22 ballot measure:

23 The Framework contains a *quo warranto* implementation plan to be followed by the City and
24 the bargaining units representing employees in the Federated City Employees' Retirement
25 System that is similar to the process agreed to with the SJPOA and IAFF, Local 230. If the
26 *quo warranto* process described in the Framework succeeds, the bargaining units representing
27 employees in the Federated City Employees' Retirement System agree to work with the City
28 on a 2016 ballot measure that will supersede Measure B and incorporate the following
provisions: (1) A provision requiring voter approval of defined retirement benefit
enhancements; (2) A provision requiring actuarial soundness; (3) A provision prohibiting
retroactivity of defined retirement benefit enhancements; and (4) Any other provisions
contained in the Framework, that the parties may mutually agree to.
If the *quo warranto* process is not successful in invalidating Measure B, the parties agree that
the Framework will be implemented via a ballot measure in November 2016.

1 (City of San Jose Memorandum to the Honorable Mayor and City Council from Jennifer Schembri
2 and Jennifer A. Maguire, dated December 4, 2015, pp. 15-16, Ex. 7 to RJN.)

3 The City Council approved the terms of the Federated Settlement Framework at its December
4 15, 2015 meeting and authorized the City Manager to negotiate and execute a Retirement
5 Memorandum of Agreement between the City and Federated Bargaining Units. (City of San Jose,
6 City Council Agenda, December 15, 2015 Synopsis, p. 13, Ex. 8 to RJN.) In addition to numerous
7 other provisions in the Federated Settlement Framework, like it did in the PF Settlement Framework,
8 the City agreed to the "Removal of language limiting vesting of benefits from City Charter (Section
9 1508-A (h))." (Federated Alternative Pension Reform Settlement Framework, dated November 23,
10 2015, updated December 14, 2015 (City of San Jose), p. 4, Ex. 6 to RJN.)

11 On February 23, 2016, the City posted on its website an updated executive summary of the
12 Federated Settlement Agreement, dated February 24, 2016. (Federated Alternative Pension Reform
13 Settlement Framework Agreement – Executive Summary, dated February 24, 2016 (City of San Jose)
14 Ex. 9 to RJN). This document reiterates the terms of the Federated Settlement Framework, except
15 that the Association of Building, Mechanical, and Electrical Inspectors ("ABMEI") is now a party to
16 the settlement. The Federated Settlement Agreement reveals the City is still in negotiations with the
17 Federated Retirees Association, and implementation of the agreement "is contingent on reaching an
18 agreement with other parties to litigation." (*Id.* at p. 1, Ex. 9 to RJN.)

19 B. Intent of Measure B.

20 Measure B was designed to protect the City's employees, residents and voters. In Section
21 1502-A, Measure B states its intent, in part: "This Act is intended to ensure the City can provide
22 reasonable and sustainable post-employment benefits while at the same time delivering Essential City
23 Services to the residents of San Jose." (Excerpts of the San Jose City Charter, Article XV-A, § 1502-
24 A, pp. 67-68, Ex. 1 to RJN.)

25 Measure B's findings include, among others, 1) "The City's ability to provide its citizens with
26 Essential City Services (i.e., police protection; fire protection; street maintenance; libraries; and
27 community centers) has been and continues to be threatened by budget cuts caused mainly by the
28 climbing costs of employee benefit programs, and exacerbated by the economic crisis"; 2) "Without

1 the reasonable cost containment provided in this Act, the economic viability of the City, and hence,
2 the City's employment benefit programs, will be placed at an imminent risk"; 3) "By this Act, the
3 voters find and declare that post employment benefits must be adjusted in a manner that protects the
4 City's viability and public safety, at the same time allowing for the continuation of fair post-
5 employment benefits for its workers"; 4) "This Act is intended to strengthen the finances of the City
6 to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at the time
7 of the voters' initial adoption of the City's retirement programs. It is further designed to ensure that
8 future retirement benefit increases be approved by the voters". (*Id.*, § 1501-A, p. 67, Ex. 1 to RJN,
9 emphasis added.) Before Measure B, these matters were not mandatorily subject to voter approval.

10 **III. Legal Argument.**

11 **A. Intervention By Proposed Intervenors Is Mandatory.**

12 Code of Civil Procedure section 387(b) provides that "the court shall, upon timely application,
13 permit [a] person to intervene" where the party seeking intervention: (1) has an interest relating to the
14 property or transaction that is the subject of the action; (2) is so situated that the court's decision in
15 the matter may, as a practical matter, impair the Intervenor's ability to protect their interest; and (3)
16 the Intervenor's interest is not adequately represented by an existing party. (Emphasis added.)
17 California courts have long recognized that the right to intervene "is best determined by a
18 consideration of the facts of [each] case." (*Isaac v. Jones* (1898) 121 Cal. 257, 261; see also *Jersey*
19 *Maid Milk Products Co. v. Brock* (1939) 13 Cal.2d 661.) It has also been well-established by the
20 California Supreme Court that intervention should be liberally construed in favor of intervention.
21 (See, e.g., *Belt Cas. Co. v. Furman* (1933) 218 Cal. 359, 362; see also *Simpson Redwood Co. v. State*
22 *of California* (1987) 196 Cal.App.3d 1192.)

23 **1. Proposed Intervenor Constant is an intended beneficiary of Measure B.**

24 Proposed Intervenor Constant is a member of the City's retirement system by virtue of his 11
25 years of service on the City's police force. Measure B directly affects his retirement payments and
26 health care benefits, as described in Constant's Declaration filed herewith. Measure B expressly
27 states its intent "to ensure the City can provide reasonable and sustainable post employment benefits
28 while at the same time delivering Essential City Services to the residents of San Jose." (Excerpts of

1 the San Jose City Charter, Article XV-A, section 1502-A, p. 67, Ex. 1 to RJN.) Proposed Intervenor
2 Constant is clearly within the class of persons intended to be protected by Measure B, and is entitled
3 to intervention in this action. Constant possesses a “specific interest that would be directly affected
4 in a substantial way by the outcome of the litigation.” (*City and County of San Francisco v. State of*
5 *California* (2005) 128 Cal.App.4th 1030, 1040 (“CCSF”) [“Unless the law in question was
6 specifically designed to protect these individuals, and unless they allege a potential injury from the
7 judgment that the law was specifically enacted to prevent, intervention is inappropriate because the
8 judgment will not directly affect either type of supporter.”]; *People ex rel. Rominger v. County of*
9 *Trinity* (1983) 147 Cal.App.3d 665, 662; compare, e.g., *Socialist Workers 1974 Cal. Campaign*
10 *Comm. v. Brown* (1976) 53 Cal.App.3d 879, 886 [proposed Intervenor organization showed no direct
11 involvement in the enactment of the challenged statutes, alleged only that its members were California
12 residents who “work[ed] for the improvement of political and governmental institutions”].)

13 2. Proposed Intervenor Constant has a direct interest as drafter of Measure B.

14 Proposed Intervenor Constant was also one of the chief architects of Measure B. Its enactment
15 by the voters was one of the key achievements of Constant’s tenure on Defendant’s City Council.
16 (Decl. of Constant, ¶ 13.) Measure B was also largely upheld against substantive attack in the
17 Consolidated Cases. Constant was invited to join the Reason Foundation as a senior fellow in part
18 on the basis of his key role in development of Measure B. (Decl. of Constant, ¶ 15.)

19 The right of an author of legislation—including the author of a ballot measure—to intervene
20 in litigation challenging that law is uncontroversial. For example, in *Field v. Bowen* (2011) 199
21 Cal.App. 346, 352, rev. denied, former Senator and Lieutenant Governor Abel Maldonado, the
22 legislative sponsor of Proposition 14, which was placed on the ballot by the Legislature, and SB 6
23 successfully intervened in the case. (See also *Rubin v. Bowen* (2015) 233 Cal.App. 4th 1128, 1136
24 [same]; *Watson v. Fair Political Practices Commission* (1990) 217 Cal.App.3d 1059, 1067 [court
25 granted intervention to the author of Proposition 73, Assembly member Ross Johnson, in a suit
26 challenging the constitutionality of that measure]; *Water Quality Association v. City of Escondido*
27 (1997) 53 Cal.App.4th 755, 759 [recognizing intervention by the “author of a model ordinance on
28 which the City [of Escondido] based its version” of a challenged water reclamation ordinance];

1 *Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250 [“the organization that drafted
2 Proposition 103 and campaigned for its passage” was granted intervention].)

3 3. Proposed Intervenor SVTA, whose members include San Jose voters who
4 supported Measure B, as well as proposed Intervenor Haug, hold a direct and
5 immediate interest in its implementation.

6 Proposed Intervenor SVTA is a not-for-profit organization whose members include San Jose
7 taxpayers and voters who directly benefit from Measure B. SVTA is a long-standing organization
8 advocating taxpayer interests, and whose political committee was primarily formed to support
9 Measure B at the June 5, 2012 election. SVTA’s then president, John Roeder, signed the ballot
10 argument in favor of Measure B and SVTA actively campaigned to its members and the general public
11 for its passage. SVTA’s membership includes San Jose voters who voted for Measure B, and who
12 have a direct interest in this matter as described in the next paragraph. (Decl. of SVTA, ¶ 3.)

13 Proposed Intervenor Steven Haug is treasurer of SVTA and is a resident, homeowner,
14 taxpayer and registered voter of the City. He supported and voted in favor of Measure B. Proposed
15 Intervenor Haug, like the other San Jose voters who are members of SVTA, has an interest in the
16 preservation of Measure B, in the form approved by the voters pursuant to their Constitutional
17 initiative and charter amendment powers. In addition, Section 1504-A reserved to San Jose voters
18 authority to “consider any change in matters related to pension and other post-employment benefits,”
19 and requires voter approval of any increases to pension or retiree-healthcare benefits, other than Tier
20 2 benefit plans, as set forth in Measure B. This provision of Measure B granted authority to San Jose
21 voters that they did not have before the passage of the measure. Section 1504-A was upheld as valid
22 by Judge Lucas of this Court in the Consolidated Cases.

23 4. A ruling invalidating Measure B will impair proposed Intervenor’s interests.

24 Plaintiffs in this action are directly challenging the legality of the enactment of Measure B,
25 and thereby seeking to nullify the considerable benefits, authority, reputational integrity and landmark
26 legislative and electoral achievements of proposed Intervenor. First, Measure B was designed to
27 protect retirees like Constant. Intervenor Constant believes the long term stability of the pension
28 system of which he is a beneficiary is enhanced by Measure B, and will be harmed by its nullification.
29 (Decl. of Constant, ¶¶ 17-18; *CCSF v. State of California, supra*, 128 Cal. App.4th 1030, 1040.) An

1 express purpose of Measure B was to ensure the solvency and protect the viability of the City's
2 pension system during fiscal crisis. (Compare, *In re City of Stockton* (E.D. Cal. 2015) 526 B.R. 35,
3 39 (“[T]he City's pension administration contract with CalPERS, as well as the City-sponsored
4 pensions themselves, may be adjusted as part of a chapter 9 plan.”).)

5 A ruling nullifying Measure B would also undermine Constant's interest as a chief architect
6 and supporter of Measure B, and have a negative impact on his professional credentials. As set forth
7 in Intervenor Constant's declaration, in recent pension reform negotiations in the State of Arizona,
8 Constant is informed and believes there were attempts to undermine his credibility by assertions that
9 Measure B had been a debacle for the City of San Jose rather than a successful reform campaign.
10 (Decl. of Constant, ¶¶ 17-18; see also section III(A)(2) of this memorandum.)

11 If Measure B is invalidated, San Jose voters who are members of proposed Intervenor SVTA,
12 and proposed Intervenor Haug will lose their direct authority over changes related to pension and
13 other post-employment benefits accorded them in Measure B. In addition, the exercise of their
14 constitutional power to amend their city's charter will be nullified, and all the resources and effort
15 dedicated to campaigning for passage of Measure B will be rendered for naught. (See *Field v. Bowen*,
16 *supra*, 199 Cal.App. 346, 352 [the California Independent Voter Project, “an organization
17 representing the interests of independent (‘Decline-to-State’) candidates”, who directly benefit from
18 Prop. 14, and Yes on 14—Californians For An Open Primary, a citizens committee that advocated
19 for adoption of Proposition 14, successfully intervened in the case].) Thus, unlike cases where
20 intervention is not granted because a group's membership lacks an interest in the litigation that is
21 “more than a general interest in upholding the statute in question,” SVTA and Haug, possess a
22 “specific interest that would be directly affected in a substantial way by the outcome of the litigation.”
23 (*People ex rel. Rominger v. County of Trinity*, *supra*, 147 Cal.App.3d 665, 662; see, e.g., *Socialist*
24 *Workers 1974 Cal. Campaign Comm. v. Brown*, *supra*, 53 Cal.App.3d 879, 886 [proposed Intervenor
25 organization showed no direct involvement in the enactment of the challenged statutes, alleged only
26 that its members were California residents who “work[ed] for the improvement of political and
27 governmental institutions,” and were therefore found by the court to have only an indirect interest in
28 the case, no different than that of the public at large].) SVTA not only participated directly in the

1 enactment of Measure B through its PAC, but the voters it represents, including Intervenor Haug, are
2 the intended beneficiaries of Measure B and granted new authority over certain future changes to the
3 San Jose's pension system, and therefore clearly have a stake in this litigation. (Decl. of SVTA, ¶¶
4 2-7, 9-10 and Decl. of Haug, ¶¶ 2, 5-7 ; see also *County of Fresno v. Andrus* (9th Cir. 1980) 622 F.2d
5 436, 438 [intervention granted because proposed Intervenor, who desired to purchase federally
6 irrigated excess farmlands, were "precisely those Congress intended to protect with the reclamation
7 acts and precisely those who will be injured if the Department of the Interior does not act
8 expeditiously in accordance with the mandates of the [law]"]; *CCSF v. State of California, supra*,
9 128 Cal.App.4th 1030, 1041 [recognizing the unique interest of those individuals that the law in
10 question was specifically designed to protect].)

11 5. Proposed Intervenor's interests are not represented by existing parties.

12 It goes without saying that Relator's interest in this litigation is hostile to that of proposed
13 Intervenor. Relator seeks nullification of Measure B. While Defendant, City of San Jose has the
14 obligation to defend the laws of the City and did so in the Consolidated Cases, in this action proposed
15 Intervenor are informed and believe Defendant, under the administration elected in 2014, and despite
16 campaign promises to the contrary, proposes to abandon this responsibility by stipulating to the
17 illegality of the process by which Measure B was enacted, and to judicial substitution of other
18 provisions negotiated with Relator. The California Supreme Court has recognized that, even where
19 the government has a duty to defend an initiative adopted by the voters,

20 [W]e believe the trial court in most instances should allow intervention by proponents of the
21 initiative. To fail to do so may well be an abuse of discretion. Permitting intervention by the
22 initiative proponents under these circumstances would serve to guard the people's right to
exercise initiative power, a right that must be jealously defended by the courts.

23 (*Building Industry Ass'n of Southern Cal., Inc. v. City of Camarillo* (1986) 41 Cal.3d 810, 822.) This
24 passage of *Building Industry Association v. City of Camarillo*, was discussed at length by the
25 California Supreme Court in *Perry v. Brown* (2011) 52 Cal.4th 1116, and adopted as the rule:

26 First, the passage recognizes that although public officials ordinarily have the responsibility
27 of defending a challenged law, in instances in which the challenged law has been adopted
28 through the initiative process there is a realistic risk that the public officials may not defend
the approved initiative measure "with vigor." (*Building Industry Assn., supra*, 41 Cal.3d at p.
822.)

1 Second, the passage explains that because of the risk that public officials may not defend an
2 initiative's validity with vigor, a court should ordinarily permit the official proponents of an
3 initiative measure to intervene in an action challenging the validity of the measure in order
4 "to guard the people's right to exercise initiative power." (*Building Industry Assn.*, *supra*, 41
5 Cal.3d at p. 822.)

6 (*Id.* at 1149.) While in this case, the City Council initially supported Measure B, and there is no
7 individual proponent of Measure B, the City under the 2014 administration is hostile to Measure B.
8 Proposed Intervenor Constant, its legislative architect on the City Council, and proposed Intervenor
9 SVTA and Haug, representing the voters who enacted the Charter Amendment into law, fulfill the
10 purpose of permitting initiative proponents to intervene in litigation challenging the legislation –
11 vigorous defense. Without their intervention, no party to this action will defend Measure B, the
12 voters' constitutional right to enact it by charter amendment, or the interests of Proposed Intervenor.
13 The voters' constitutional right to enact initiative legislation will be thwarted because of the
14 vicissitudes of City Council and mayoral politics. Permitting proposed Intervenor to intervene also
15 "enhances both the substantive fairness and completeness of the judicial evaluation of the initiative's
16 validity and the appearance of procedural fairness that is essential if a court decision adjudicating the
17 validity of a voter-approved initiative measure is to be perceived as legitimate by the initiative's
18 supporters." (*Id.*, at 1151; see also *Bates v. Jones* (N.D. Cal. 1995) 904 F. Supp. 1080, 1087 [granting
19 intervention to initiative proponents and rejecting argument that intervention is unnecessary because
20 the interest of Intervenor would be adequately represented by Defendant Secretary of State, who
21 "will vigorously defend the validity of the California constitutional provision"].)

22 6. This application is timely.

23 Section 387 provides for intervention "upon timely application." This application is timely.
24 First, the parties to this action acknowledge that, at this point, the *quo warranto* process has not been
25 "initiated." (City of San Jose Supplemental Memorandum to the Honorable Mayor and City Council
26 from Jennifer Schembri, dated August 17, 2015, pp. 1-2, Ex. 3 to RJN; Federated Alternative Pension
27 Reform Settlement Framework Agreement – Executive Summary, dated February 24, 2016 (City of
28 San Jose), p. 1, Ex. 9 to RJN ["Once a global settlement is reached and before the *quo warranto*
process begins in court, which is a legal proceeding used to overturn a ballot measure post-election,
the parties will agree on ballot measure language for November 2016"] [emphasis added].)
Indeed, at this point, no discovery, substantive motions, or evidentiary hearings have occurred.

1 Second, the parties to this *quo warranto* proceeding have agreed intervention is appropriate
2 at this stage. Addendum No. 2 to the PF Settlement Framework contemplates Local 230 will
3 intervene in this proceeding as part of the implementation of the settlement. (Addendum #2 to July
4 15, 2015 Alternative Pension Reform Settlement Framework Between the City of San Jose and the
5 San Jose Police Officers' Association (POA), The International Association of Firefighters, Local 230
6 (IAFF); Proposed Quo Warranto Implementation Plan, August 14, 2015 (Attachment B to the August
7 17, 2015 Supplemental Memorandum), p. 1, Ex. 4 to RJN.)

8 Finally, Proposed Intervenors filed this application to intervene within a reasonable time after
9 they have become aware "their interests in the litigation were not being adequately represented."
10 (*Ziani Homeowners Assn. v. Brookfield Ziani LLC* (2015) 243 Cal.App.4th 274, 282.) Prior to mid-
11 December 2015, it was uncertain whether the City would defend Measure B or place proposed
12 amendments on the ballot for voter approval. It was contingent upon agreement of numerous other
13 bargaining units not parties to these proceedings. (City of San Jose Supplemental Memorandum to
14 the Honorable Mayor and City Council from Jennifer Schembri, dated August 17, 2015, p. 2, Ex. 3
15 to RJN.) In mid-December 2015 and February 2016, the City publicly reported that one contingency
16 had been removed -- it had reached agreement with the Federated bargaining units. At this stage, it
17 reports, however, negotiations are ongoing with the retirees' association. Thus, according to the City,
18 the *quo warranto* proceedings have not yet begun.

19 Proposed Intervenors acted with reasonable haste to investigate appropriate counsel for
20 representation, interview and retain counsel, investigate the status of all relevant proceedings, most
21 importantly the status of this proceeding, and permit their new attorneys to research and prepare for
22 this application. (Decl. of Constant, ¶ 19.) In any event, timeliness is hardly a reason to bar
23 intervention when proposed intervenors demonstrate direct interests that are threatened, and the
24 parties have not shown any prejudice other than being required to prove their case. (*Truck Ins.*
25 *Exchange v. Superior Court* (1997) 60 Cal. App. 4th 342, 350-51.)

26 **B. Proposed Intervenors Meet The Requirements For Permissive Intervention.**

27 The criteria for permissive intervention include: (1) that proper procedures have been
28 followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will

1 not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition
2 by the parties presently in the action. (Code Civ. Proc. § 387(a).)

3 1. Proposed Intervenor possess a direct interest in the outcome of this litigation.

4 In addition to the fundamental, direct interests detailed above, it is important to recognize that
5 courts frequently grant supporters and opponents of an initiative leave to intervene in litigation
6 concerning the ballot measure. (See, e.g., *Field v. Bowen, supra*, 199 Cal.App.4th 346, 352,
7 *Legislature v. Eu* (1991) 54 Cal.3d 492, 500, cert. den., 503 U.S. 919 (1992) [in an original
8 proceeding, the California Supreme Court permitted proponent of measure to intervene]; *Birkenfeld*
9 *v. City of Berkeley* (1976) 17 Cal.3d 129, 136-37 [trial court permitted groups supporting initiative to
10 intervene]; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1020
11 [trial court granted leave to intervene to group that supported city's decision to refuse to place
12 initiative on the ballot]; *Community Health Assn. v. Board of Supervisors* (1983) 146 Cal.App.3d 990,
13 992 [trial court permitted proponents and supporters of measure to intervene]; *Simac Design, Inc. v.*
14 *Alciati* (1979) 92 Cal.App.3d 146, 157 [trial court permitted supporters of measure to intervene on
15 oral motion]; *Simpson Redwood Co. v. State of California, supra*, 196 Cal.App.3d 1192, 1200-02
16 [while the interest must be such that the Intervenor will either gain or lose by the operation and effect
17 of the judgment, the Intervenor is not required to claim a specific legal or equitable interest].)

18 2. Proposed Intervenor's involvement will not enlarge the issues in this case.

19 The proposed Intervenor do not seek to expand the scope of this litigation, but rather to keep
20 the issues in this *quo warranto* action within the scope set forth by the Attorney General, which did
21 not include authority to invalidate any substantive provisions of Measure B, or stipulate to judgment
22 substituting new provisions for Measure B. (Att'y Gen. Op. 12-605 (April 15, 2013), p.1.)

23 The parties to this action have represented to the court that they intend to submit a stipulation
24 to the Court that includes this action, and "various related proceedings." The parties indicated they
25 intended to submit to the Court a "proposed stipulated judgment and order" addressing the resolution
26 of all of those matters. (Case Management Statement filed jointly by the parties to this action on
27 December 14, 2015.) Entry of a stipulated judgment in this *quo warranto* action that encompasses
28

1 resolution of related actions, is improper as beyond the scope of *quo warranto* jurisdiction and in
2 excess of the *quo warranto* authority granted by the Office of the California Attorney General.

3 Furthering the improper expansion of this action is the parties' intent to utilize the judgment
4 to nullify Measure B and substitute different provisions for Measure B that, absent the parties'
5 proposed stipulations, would remain in effect as a valid and effective part of the San Jose City Charter
6 since the City of San Jose complied with its collective bargaining obligations prior to placing Measure
7 B on the June 2012 Ballot. (See, e.g. Defendants City of San Jose's and City Council of San Jose's
8 Answer to Verified Complaint in *Quo Warranto*, ¶¶ 16, 50, 55, 62 [denying Plaintiffs' allegations
9 Defendants failed to "meet and confer"].) Proposed Intervenorers seek only to protect their interests,
10 protect the integrity of this *quo warranto* proceeding and sharpen the presentation of issues to the
11 court. Moreover, proposed Intervenorers agree to file consolidated briefs in this case.

12 3. Proposed Intervenorers' interests outweigh the parties' opposition.

13 Proposed Intervenorers have unique interests that are integral to the issues in this case and yet
14 are not shared with any party. The parties propose to invalidate a duly enacted charter amendment
15 under the California Constitution by stipulation, and with it the rights of San Jose voters, taxpayers
16 and Measure B beneficiaries. The rights of the original parties to this proceeding, therefore, cannot
17 outweigh the reasons for intervention. (See *Rominger, supra*, 147 Cal.App.3d at 661.)

18 **IV. Conclusion.**

19 Intervention should be granted under C.C.P. § 387 (a) & (b).

20 Respectfully submitted,

21 DATED: *March 9, 2016*

DATED: *March 9, 2016*

22 NIELSEN MERKSAMER PARRINELLO
23 GROSS & LEONI, LLP

LOUNSBERY FERGUSON ALTONA &
PEAK, LLP

24 By: *Marguerite Mary Leoni*

By: *[Signature]*

MARGUERITE MARY LEONI

KENNETH H. LOUNSBERY

CHRISTOPHER E. SKINNELL

JAMES P. LOUGH

JAMES W. CARSON

ALENA SHAMOS

25 Attorneys for Intervenor, PETER
26 CONSTANT

YANA L. RIDGE

27 Attorneys for Intervenorers, STEVEN
28 HAUG and SILICON VALLEY
TAXPAYERS ASSOCIATION